No. 89-7691 (6)

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

DALE ROBERT YATES,

Petitioner,

v.

PARKER EVATT, Commissioner, South Carolina Department of Corrections, and THE ATTORNEY GENERAL OF SOUTH CAROLINA,

Respondents.

On Writ Of Certiorari To The Supreme Court Of South Carolina

REPLY BRIEF FOR PETITIONER

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ARGUMENT IN REPLY

The most striking aspect of respondents' argument is its implicit concession that the evidence could have left a properly-instructed jury with a reasonable doubt as to whether Davis' killing of Helen Wood was intentional. *See* Brief of Respondents at 29-33. Far from disagreeing with petitioner's interpretation of the record on this point, respondents have instead presented a potpourri of alternative theories under which the unconstitutional presumptions of malice might still be deemed harmless. Respondents variously offer the following:

> (1) that malice was overwhelming proven under a "recklessness" theory of murder; Brief of Respondents at 25-30;
>
> (2) that malice was overwhelmingly proven under a transferred-intent theory, Davis allegedly having killed Helen Wood while trying to murder Willie Wood, *id.*, 31-33; and
>
> (3) that malice was conclusively established in connection with Helen Wood's death simply by the robbery and shooting which immediately preceded it. *Id.*, 50-53.

As an initial matter, none of these alternative theories was presented to the jury by the trial judge's instructions, and none of them forms any part of the state supreme court majority's discussion of harmless error in this case. *Yates v. Aiken*, ___ S.C. ___, 391 S.E.2d 530 (1989); J.A. 149-152. Rather, the state supreme court simply appears to have based its judgment on an exaggerated rendition of the record evidence of Davis' intent to kill Mrs. Wood. *Id.*, J.A. 150-151 (court describes Davis as having "lunged at Mrs. Wood with his knife," and as having inflicted a "multiple stabbing"). Respondents have apparently now

abandoned this factually erroneous basis for the state supreme court's harmless-error finding. However, as will be seen, respondents' various substitute rationales cannot be sustained under South Carolina law, and the state supreme court's failure to embrace any of them is not difficult to understand.

A. Even assuming that the jury understood its task to involve a determination of Davis' mental state, the evidence of his malice was far from overwhelming.

1. Malice requires more than mere recklessness

Respondents strenuously insist that the element of malice does not require a specific intent to kill, but only recklessness. Brief of Respondents at 26-27 (malice "signifies a mental state which is reckless of the lives and safety of others"). Because Davis was at least reckless in robbing and struggling with Willie Wood at knife point, respondents argue, his killing of Mrs. Wood was necessarily malicious even if unintentional, and the unconstitutional presumptions of malice were therefore harmless.

This argument both misstates the applicable state law, and lacks support in the record of this case. As a matter of South Carolina law, mere recklessness is *not* sufficient to prove malice. A reckless killing constitutes the offense of involuntary manslaughter, not murder. S.C. Code §16-3-60 (1985) (defining the element of criminal negligence in involuntary manslaughter as "the reckless disregard of the safety of others."). Respondents are correct that murder does not require a specific intent to kill a particular individual: even absent a specific intent to kill, a defendant may exhibit a recklessness so extreme as to

be equivalent to intent, and in such cases, the element of malice is established. *State v. Mouzon*, 231 S.C. 655, 99 S.E.2d 672 (1957); LaFave & Scott, 2 *Substantive Criminal Law* 199-206 (1986). But "[o]bviously this degree of recklessness must involve more egregious conduct than that 'reckless disregard for the safety of others' which is the statutory definition of the criminal negligence predicate to an involuntary manslaughter prosecution." McAninch & Fairey, *Criminal Law of South Carolina* 85 (2d ed. 1989). *State v. Mouzon, supra*, on which respondents rely, makes this clear: for an unintentional killing to constitute murder, there must be "evidence of such recklessness and wantonness as to indicate a depravity of mind and disregard of human life, from which a jury could infer malice." *Id.*, 231 S.C. at 677, 99 S.E.2d at 675.

To be sure, the evidence in this case might have justified a jury finding (had the jury been instructed to consider the issue) that Davis acted with so extreme a degree of recklessness as to amount to malice. But the evidence surely did not *compel* such a finding: whether Davis' recklessness in the death of Mrs. Wood was merely criminal, S.C. Code §16-3-60, or actually "malignant," *State v. Heyward*, 197 S.C. 371, 15 S.E.2d 669, 671 (1941), was undeniably a matter on which reasonable jurors could differ.[1]

---

[1] This is especially true in view of the subtlety of the distinction between the mental states required for involuntary manslaughter and "depraved-heart" murder. Such distinctions "are, of course, matters of degree, and there is no exact boundary line between each category; they shade gradually like a spectrum from one group to another." LaFave & Scott, *supra*, at 200.

In any event, petitioner's jury did not consider any of this, because the trial court did not instruct the jury on unintentional or "depraved-heart" murder. On the contrary, the trial court used the term "malice" interchangeably with "intent to kill." Specifically, the trial judge stated that "[m]alice may be expressed . . . [by] circumstances which show directly that *an intent to kill* was really and actually entertained." J.A. 96 (emphasis added). He went on to introduce the concept of implied malice as follows: "Malice may also be implied as where, although no expressed intention to kill was proved by direct evidence, *it is indirectly and necessarily inferred* from facts and circumstances which are, themselves, proved." *Id.* (emphasis added). Under these circumstances, and given that the trial judge at no time suggested that the malice required for murder could be anything less than a wrongful intent to kill, respondents' misleading equation of murder and involuntary manslaughter under South Carolina law would have had no relevance to this case even if it had fairly reflected the state law involved.

2. The record does not support respondents' transferred-intent rationale for harmless error

While it is not entirely clear from their brief, respondents also appear to be arguing that Davis' malice was overwhelmingly proven on a separate theory of *transferred* intent to kill – namely, that Davis killed Helen Wood while attempting to kill Willie Wood. Respondents correctly assert that malice may be shown by evidence that the accused accidentally killed one person while intentionally attempting to murder someone else. *State v. Heyward*, 197 S.C. 371, 15 S.E.2d 669 (1941). But there are

two reasons why this well-settled proposition of law is irrelevant here.

The first reason is that the state did not rely on a theory of transferred intent, the trial judge did not charge it, the jury presumably did not consider it, and the state supreme court's opinion includes no factual findings to support it. The second reason is that the evidence that Davis was attempting to kill Willie Wood when Helen Wood was stabbed is by no means overwhelming. The only pertinent testimony – that of Willie Wood – paints a rather confusing picture of what transpired during the few seconds between the start of the robbery and the stabbing of Mrs. Wood. J.A. 18-19, 25-29. While the state sought at trial to have the jury draw the inference that Davis intended to kill Willie Wood, a properly-instructed jury might just as easily have concluded that Davis was only attempting to avoid being shot as he scuffled with Wood, and that Wood's recollection of the events was colored by his understandable hatred of Davis, and by his need to justify his having shot Davis to death. In weighing this evidence, a reasonable juror might well have concluded that Davis would have succeeded in stabbing Willie Wood had he in fact intended to do so, especially in light of Wood's claim that the knife-wielding Davis had grappled with him before Wood was able to extricate his pistol from inside his windbreaker. J.A. 25-26. Under all the evidence presented, it is by no means certain that petitioner's jury would have found Mrs. Wood's killing to be murder under a theory of transferred intent had such a theory been charged, and respondents' rather modest claim that Davis was "in all probability" attempting to stab Willie Wood just before Mrs. Wood's death hardly

suffices to establish the harmlessness of the two burden-shifting presumptions of malice. Brief of Respondent at 32.

3. Participation in a felony does not automatically establish the malice required for murder under South Carolina law

Near the end of their brief, respondents advance yet a third legal theory which is said to remove the element of malice from controversy, and thus to render harmless the unconstitutional instructions. According to respondents, the fact that the crime of armed robbery necessarily involves malice automatically renders malicious any ensuing homicide. Brief of Respondents at 53. As a matter of South Carolina law, this is simply wrong. South Carolina law merely permits, but does not require, the jury to find malice from the commission of a felony. A clear recent illustration of this is found in *State v. Norris*, 285 S.C. 86, 328 S.E.2d 339 (1985). In *Norris*, a capital rape-murder prosecution, the trial judge informed the jury that it *could* infer malice if it concluded "that the homicide was a proximate, direct result of the commission of a felony," and if the defendant "was in the commission of a felony at the time of the fatal blow." When the jury subsequently inquired "whether or not death during the commission of . . . a felony . . . constitute[s] malice," the trial judge stressed that this inference of malice was purely permissive, and was simply one of the facts and circumstances which the jury should take into account in determining whether malice had been proven. 285 S.C. at 91, 328 S.E.2d at 342. Approving these instructions, the South Carolina Supreme Court emphasized that "South

Carolina . . . makes no distinction between murder and felony-murder," *State v. Yates*, 280 S.C. 29, 38, 310 S.E.2d 805, 810 (1982), *cert. denied*, 462 U.S. 1124 (1983), J.A. 106, and reminded the state's trial judges of the permissive nature of the inference of malice from an intentional killing during the commission of a felony. 285 S.C. at 92, 328 S.E.2d at 342-343. *Accord*, *State v. Elmore*, 279 S.C. 417, 308 S.E.2d 781 (1983); *see also*, *State v. Thompson*, 278 S.C. 1, 7, 292 S.E.2d 581, 585, *cert. denied*, 456 U.S. 938 (1982) (instruction on lesser-included offense of involuntary manslaughter not required in robbery-murder prosecution only because second shot to head of victim was undeniably intentional). Respondents acknowledge none of this well-established South Carolina law, but seek instead to salvage petitioner's conviction by invoking a non-existent state rule of felony-murder.[2]

B. The trial court's instructions did not clearly require the jury to make any finding concerning whether Davis acted with malice

Although the South Carolina Supreme Court cited no basis in the record for its apparent assumption that the jury understood its task to be to determine whether *Davis*

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[2] It might be recalled that the South Carolina Supreme Court found only that the evidence "made a jury issue as to the murder charge" under an accomplice liability theory. *State v. Yates*, 280 S.C. 29, 38, 310 S.E.2d 805, 810 (1982), J.A. 106. Under respondents' view of South Carolina law, by contrast, no such jury issue actually appears, because Yates' in-court admission that he participated in a robbery of the Wood store would be tantamount to a plea of guilty to Mrs. Wood's murder.

acted with malice when he killed Helen Wood, and although two of that court's five members found no such instruction to have been given, J.A. 144 ("the trial judge failed to articulate that the jury must find the killer acted with malicious intent") (Toal J. dissenting), respondents now find the trial judge's instructions on this point to have been "crystal clear." Brief of Respondents at 35. The sole support offered for this contention is the judge's single reference, at the very end of the instructions on express and implied malice, to the jury's duty "to make a determination as to whether malice existed in the heart and mind of the killer at the time the fatal blow was struck." J.A. 96-97.

Petitioner has already listed the many other portions of the charge and of the prosecutor's closing argument which clearly suggested that the question before the jury was whether *Yates* entertained malice. Brief of Petitioner at 24-27. Respondents have failed to reply to any of these points, and have offered no valid reason for concluding that the jury was guided by the single half-sentence cited (out of context) in respondents' brief, rather than by the rest of the record. Accordingly, little further discussion of this aspect of the case is called for here. Petitioner would note only that the portion of the trial judge's charge now relied upon so heavily by respondents actually undermines respondents' argument that the circumstances *preceding* the killing of Mrs. Wood – petitioner's and Davis' plan to commit an armed robbery, their brandishing of weapons, Davis' order to shoot at Willie Wood, and petitioner's firing of two shots – can be taken as conclusive proof of malice in connection with the homicide. To the extent that this fragment of the court's instructions

focused the jury's attention of Davis' intent, the question which it placed before the jury was whether malice was entertained "at the time the fatal blow was struck," not before. *Accord, State v. Norris*, 285 S.C. 86, 91, 328 S.E.2d 339, 342 (1985).

C. The burden-shifting instructions could have affected the jury's assessment of either or both of Yates' defensive claims – that he did not intend to commit a crime likely to result in death, and that he had withdrawn prior to the killing.

In addition to their new theories concerning why the unconstitutional instructions could not have affected the jury's determination of Davis' malice, respondents also assert that the instructions could not have prejudiced Yates even if the jury understood its task to be to determine whether *he* acted with malice. To make this argument, respondents assert in effect that both of Yates' defenses to the state's accomplice liability prosecution – that he did not intend any crime likely to result in death, and that he had withdrawn – were unavailable as a matter of law.

First, respondents argue that "the Petitioner's intent regarding the possibility of a homicide [resulting from the planned robbery] is irrelevant" to the assessment of petitioner's vicarious liability for Mrs. Wood's death. Brief of Respondents at 44. Respondents are able to make this assertion only be ignoring the leading South Carolina case on point. In *State v. Peterson*, 287 S.C. 244, 335 S.E.2d 800 (1985), the South Carolina Supreme Court reversed a capital murder conviction on the basis of accomplice liability instructions which failed to require the jury to

determine whether a homicide was "a natural and probable consequence of the acts *actually agreed upon* by the [defendants]." 287 S.C. at 247, 335 S.E.2d at 801-802 (emphasis added). While *Peterson* does not, of course, require an express intent to kill on the part of an accomplice, it can only be read as requiring that the state prove the defendant's intent to commit a crime likely to result in death in order to justify conviction of murder on an accomplice liability theory.[3] *Peterson* leaves no doubt that a defendant's intent to commit a crime likely to result in death is an element of accomplice liability for murder under South Carolina law. Although respondents' brief nowhere acknowledges petitioner's testimony at trial by which he vigorously contested the existence of this element, the record plainly shows that petitioner's primary defense to the murder charge was his insistent claim that the robbery plan specifically excluded the actual use of violence. And because the jury could reasonably have understood the malice instructions to shift the burden of

[3] The one South Carolina accomplice liability murder case which respondents do cite, *Thrift v. State*, ___ S.C. ___, 397 S.E.2d 523 (1990), actually reaffirms *Peterson*. Far from removing any requirement of intent, *Thrift* simply held that the instructions given in that case sufficiently apprised the jury of the requirement that the homicide be "a probable and natural consequence of the acts done in pursuance of *the common design*." *Id.*, 397 S.E.2d at 526 (emphasis added). In *Thrift*, moreover, the defendant had failed to create a genuine issue concerning the likelihood of death from the common design, since he acknowledged on the witness stand that he anticipated "that the victim would at least be roughed up" by him and his accomplice, both of whom were armed. *Id.* 397 S.E.2d at 525.

persuasion on this aspect of petitioner's intent, the instructions' prejudicial potential is clear.

Respondents' dismissal of petitioner's claim of withdrawal is likewise unfounded in state law. While counsel for respondents find petitioner's claim of withdrawal to be "perhaps the most ludicrous of Petitioner's claims," they cite no authority whatever in support of their characterization. By contrast, the South Carolina Supreme Court has never intimated in three written opinions in this case that petitioner's testimony was insufficient as a matter of law to make out a defense of withdrawal with respect to the murder charge. Petitioner's research has revealed no South Carolina case clarifying the precise extent to which a conspirator must abandon the criminal enterprise in order to be absolved of liability for a subsequent homicide. But given the failure of the South Carolina Supreme Court to adopt respondents' view of the legal adequacy of Petitioner's claim of withdrawal here, there is no reason to assume that this claim was untenable under state law, or that the burden-shifting malice instructions could not have "eclipsed Yates' defense of withdrawal, and prejudiced his right to a fair trial." *Yates v. Aiken*, ___ S.C. ___, 391 S.E.2d 530, 535 (1989); J.A. 165 (Toal, J., dissenting).

D. This case provides no occasion to announce a radical curtailment of the Sixth Amendment right to trial by jury in criminal cases.

Before concluding, a word should be said about the request of the amicus curiae state of California for a sweeping overruling of this Court's long-settled rule that

an appellate court may not direct a verdict of guilty as to an element of a criminal offense. *Rose v. Clark*, 478 U.S. 570, 578 (1986); *Bollenbach v. United States*, 326 U.S. 607, 614 (1946). California's proposal is not susceptible of principled limitation: if the Sixth Amendment right of jury trial extends only to "any issue that [is] contested or contestable," Brief for the State of California at 14, then no constitutional issue would be presented by a trial judge's peremptory direction of a verdict in favor of the prosecution as to each element found to be "uncontested" or overwhelmingly established. Indeed, where the judge discerned *no* contested elements at the close of the evidence, California would apparently read the Sixth Amendment as authorizing him to take the case from the jury and enter a verdict of conviction by direction of the Court.[4]

For now, however, it need only be observed that the Court need not pass upon the merits of California's proposal to decide this case. Unburdened by any reference to the facts and issues presented by this petitioner's case, California's brief considers only whether certain errors should require reversal even if they could not have affected the outcome. For the reasons set forth in petitioner's opening brief, the burden-shifting jury instructions given in this case could well have affected the jury's verdict on the charge of murder, and reversal is therefore

[4] It is difficult to see, moreover, why California's argument is presented as one involving harmless-error doctrine. For if the Sixth Amendment entitles a criminal defendant to a jury's resolution of "contested" issues only, the removal of "uncontested" issues by directed verdict for the prosecution would not be constitutional error at all, "harmless" or otherwise.

required under even the most permissive mode of harmless-error review.

CONCLUSION

For the reasons set for above and in petitioner's opening brief, the judgment of the South Carolina Supreme Court should be reversed.

Respectfully submitted,

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